

NON-ASSESSMENT OF LIQUIDATED DAMAGES

Reference is made to Estimate No. _____

Contract No. _____

covering the period _____ to _____ inclusive.

- [] No liquidated damages are being assessed since request(s) for extension(s) to time have been received but not as yet resolved. If these requests are denied in whole or in part, there are sufficient monies still due the contractor under contract line items on the construction phases and/or in the retained percentage to cover assessment of liquidated damages, if any are determined to be due.
- [] No liquidated damages are being assessed since acceptance of the contract work on Phases II, III, and IV (construction) on behalf of the Government was accomplished on _____. However, still pending completion, but not subject to liquidated damages are the following items:

[Examples] Testing

Punch list items
Submittal of payrolls
Administrative items
Settlement of Claims
Finalization of Modifications

Chief, Construction Directorate

Exhibit 8*9. Non-Assessment of Liquidated Damages

FINAL COMPLETION STATEMENT

Estimate No. _____

I certify that the date fixed for completion of work for Phases III and IV under Contract No.

_____ as modified through Modification No. _____ is

_____ ; and that this work was substantially completed on _____, 19____. I
accepted the work on behalf of the Government on _____ 19_____.

The contractor has been assessed damages, as follows:

Liquidated damages from _____ through _____

being _____ days at \$ _____ per day, or \$ _____.

Those remaining items not subject to liquidated damages, _____,

have been accomplished as of _____, 19_____.

All modifications have now been formalized and all administrative requirements of the work under Phases III and IV have been satisfied. It is recommended that the final estimate for this work be approved for payment.

RESIDENT ENGINEER

APPROVED:

Chief, Construction Directorate
Contracting Officer's Rep.

Date: _____

Exhibit 8*10. Completion Statements (Final Construction Completion Statement)

RELEASE OF CLAIMS

The undersigned contractor under Contract No. _____ dated
_____, 199 _____ between the United States of America and said contractor for
_____[Describe the work]_____
_____ at _____; in accordance with paragraph (h) (3) of contract
clause, "Payments Under Fixed-Price Construction Contracts" hereby releases the United States, its
officers, agents, and employees from any and all claims arising under or by virtue of Phases III and IV of said
contract or any modification or change thereof.

(Date)_____
(Contractor's name exactly as shown on
the face of the contract.)

Exhibit 8*10. Completion Statements (Release of Claims).

26 May, 1994

SUBJECT: Contractor No. XXXXXXXXXXXX, Payment of Subcontractors

Gov't Contractor, Inc.
7500 Old Georgetown Road
Bethesda, Maryland 20814-5122

Dear Mr. (Or Ms. _____):

We have received the attached letter from XXXXXXXXXXXX, stating that payment has not been made for supplies or services on your contract, Contract No. XXXXXXXXXXXX. Please review this complaint and fully explain the situation to me, in writing NLT XX XXX XXXX. I also wish to remind you of your obligations under your federal contract.

You should be aware that failure to pay for supplies or services may subject you and your bonding company to suit under the Miller Act.

You should also be aware of your obligations under several provisions of your contract. FAR 52.232-5, Payments under Fixed-Price Construction Contracts, which is part of your contract, requires that when you made a request for progress payments: (1) you certify that payments to subcontractors and suppliers have been made from the proceeds of the payment covered by this certification, in accordance with subcontract agreements and the requirements of 31 USC, chapter 39; and (2) your request for progress payments does not include any amounts which the prime contractor intends to withhold or retain from a subcontractor or supplier in accordance with the terms and conditions of the subcontract.

Please be advised that a false certification may subject you and your company to civil and criminal liability under federal law.

Furthermore, the Payments clause also provides that:

If the Contractor, after making a certified request for progress payments, discovers that a portion or all of such request constitutes a payment for performance by the Contractor that fails to conform to the specifications, terms, and conditions of this contract (hereinafter referred to as the unearned amount), the Contractor shall - (1) Notify the Contracting Officer of such performance deficiency; and (2) Be obligated to pay the Government an amount (computed by the Contracting Officer in the manner provided in 31 USC 3903 (c)(1) equal to interest on the unearned amount until - (I) The date the contractor notifies the Contracting Officer that the performance deficiency has been corrected; or (ii) The date the Contractor reduces the amount of any subsequent certified request for progress payments by an amount equal to the unearned amount.

Furthermore, a contractor fails to meet the obligations of timely payment to suppliers and subcontractors may be liable for interest to both the US and to the subcontractor or supplier in accordance with the provisions of FAR52.232.27, Prompt Payment for Construction Contracts. This clause is also part of your contract.

Also, the Prompt Payment Clause requires contractors to give notice to subcontractors and suppliers and to the Government in the event that progress payments are withheld from a subcontractor. Section (g) of the Prompt Payment clause requires the contractor to give written notice of any withholding to a subcontractor, with a copy to the Contracting Officer, specifying (1) the amount to be withheld, (2) the specific causes for the withholding under the terms of the subcontract, and (3) the remedial actions to be taken by the subcontractor in order to receive payment of the amounts withheld.

You should also note that section (f) of the Prompt Payment clause places obligations on the contractor in the event that second tier subcontractors or suppliers notify the prime contractor of payment deficiencies under the Miller Act.

Also, DOD Authorization Act of 1992, Public law 102-190, section 806 provides that when a subcontractor or supplier of a DOD prime contractor asserts that it has not been paid by the prime in accordance with the terms of its agreement with the prime, the Contracting Officer may determine (1) whether the prime has made progress payments or final payment to the subcontractor or supplier, and (2) the accuracy of any prime contractor certification of payment to the sub or supplier which accompanies the prime's own Prompt Payment request for progress payment by the Government.

Finally, if the Contracting Officer determines that the prime has not complied with such things as subcontract payment provisions, he or she may (a) encourage the prime to make timely payment to the sub, or (b) reduce or suspend progress payments owed to the prime. Also, if the Contracting Officer finds that a prime's payment certification is inaccurate in any material respect, then he or she is required to take appropriate...remedial action under implementing regulations.

This letter should not be construed as an opinion by the Government on the merits of subcontractor/ supplier claims against your company. It is merely a reminder of your obligations under your federal contract.

Sincerely,

/s/

Authorized Representative
of the Contracting Officer

Exhibit 8*11. Sample Letter to Inform Contractor of Subcontractor Nonpayment Complaint
(Cont'd)

DEPARTMENT OF THE ARMY
ENGINEERING AND SUPPORT CENTER, HUNTSVILLE
P.O. BOX 1600
HUNTSVILLE, ALABAMA 35807-4301

REPLY TO
ATTENTION OF:

This statement is issued for the information of persons interested in claims for material and labor supplied and used in the prosecution of work on United States buildings and public works under the control of U.S. Army Engineering and Support Center, Huntsville District.

MECHANICS LIEN

Federal buildings and public works are not subject to mechanics' liens. There is no United States law permitting such a lien. The lien laws of the States are not applicable.

THE MILLER ACT

A remedy for the protection of any person, company, or corporation who has furnished labor and/or materials used in the prosecution of the work provided for in any contract, exceeding \$25,000.00 in amount, for the construction, alteration, or repair of any public buildings or public work of the United States, and payment for which has not been made, is provided by the Act of August 24, 1935, 49 Stat. 793 (U.S. code, Title 40, Sections 270a, 270b, 270c, and 270d; as amended August 4, 1959 - P.L. 86-135, 73 Stat. 279, November 2, 1966, P.L. 89-719, Title 1, Section 105(b), 80 Stat. 1139, known as the Miller Act. This Act is applicable to all contracts exceeding \$25,000 in amount, awarded pursuant to any invitation for bids issued on or after October 25, 1935, and is set forth in the United States Code, as follows:

Section 270a.

(a) Before any contract, exceeding \$25,000 in amount, for the construction, alteration or repair of any public building or public work of the United States is awarded to any person, such person shall furnish to the United States the following bonds, which shall become binding upon the award of the contract to such person, who is hereinafter designated as contractor:

(1) A performance bond with a surety or sureties satisfactory to the officer awarding such contract and in such amount as he shall deem adequate, for the protection of the United States.

(2) A payment bond with a surety or sureties satisfactory to such officer for the protection of all persons supplying labor and material in the prosecution of the work provided for in said contract for the use of each such person. Whenever the total amount payable by the terms of the contract shall be not more than \$1,000,000 the said payment bond shall be in a sum of one-half the total amount payable by the terms of the contract. Whenever the total amount payable by the terms of the contract shall be more than \$1,000,000 and not more than \$5,000,000, the said payment bond shall be in a sum of forty (40) percent of the total amount payable by the terms of the contract. Whenever the total amount payable by the terms on the contract shall be more than \$5,000,000 the said payment bond shall be in the sum of \$2,500,000.

Exhibit 8*12. The Miller Act Information Sheet

(b) The contracting officer in respect of any contract is authorized to waive the requirement of a performance bond and payment bond for so much of the work under such contract as is to be performed in a foreign country if he finds that it is impracticable for the contractor to furnish such bonds.

(c) Nothing in this section shall be construed to limit the authority of any contracting officer to require a performance bond or other security in addition to require a performance bond or other security in addition to those, or in cases other than the cases specified in subsection (a) of this section.

(d) Every performance bond required under this section shall specifically provide coverage for taxes imposed by the United States which are collected, deducted, or withheld from wages paid by the contractor in carrying out the contract with respect to which such bond is furnished. However, the United States shall give the surety or sureties on such bond written notice, with respect to any such unpaid taxes attributable to any period, within ninety days after the date when such contractor files a return for such period, except that no such notice shall be given more than one hundred and eighty days from the date when a return for the period was required to be filed under Title 26. No suit on such bond for such taxes shall be commenced by the United States unless notice is given as provided in the preceding sentence, and no such suit shall be commenced after the expiration of one year after the day on which such notice is given.

Section 270b. (a) Every person who has furnished labor or material in the prosecution of the work provided for in such sections 270a to 270d of this title and who has not been paid in full therefor before the expiration of a period of ninety days after the day on which the last of the labor was done or performed by him or material was furnished or supplied by him for which such claim is made, shall have the right to sue on such payment bond for the amount, or the balance thereof, unpaid at the time of institution of such suit and to prosecute said action to final execution and judgement for the sum or sums justly due him: PROVIDED, HOWEVER, that a person having direct contractual relationship with a subcontractor, but no contractual relationship express or implied with the contractor furnishing said payment bond shall have a right of action upon the said payment bond upon giving written notice to said contractor within ninety days from the date on which such person did or performed the last of the labor or furnished or supplied the last of the material for which such claim is made, starting with substantial accuracy the amount claimed and the name of the party to whom the material was furnished or supplied or for whom the labor was done or performed. Such notice shall be served by mailing the same by registered mail, postage prepaid, in an envelope addressed to the contractor at any place he maintains an office or conducts his business, or his residence, or in any manner in which the United States marshal of the district in which the public improvement is situated is authorized by law to serve summons.

(b) Every suit instituted under this section shall be brought in the name of the United States for the use of the person suing, in the United States District Court for any district in which the contract was to be performed and executed and not elsewhere, irrespective of the amount in controversy in such suit, but no such suit shall be commenced after the expiration of one year after the day on which the last of the labor was performed or material was supplied by him. The United States shall not be liable for the payment of any costs or expenses of any such suit.

Section 270c. The department secretary or agency head of the contracting agency is authorized and directed to furnish, to any person making application therefor who submits an affidavit that he has supplied labor or materials for such work and payment therefor has not been made or that he is being sued on any such bond, a certified copy of such bond and the contract for which it was given, which copy shall be prima facie evidence of the contents, execution, and delivery of the original. Applicants shall pay for such certified copies such fees as the department secretary or agency head of the contracting agency fixes to cover the cost of preparation thereof.

Section 270d. The term person and the masculine pronoun as used in sections 270a and 270d of this title shall include all persons whether individuals, associations, co-partnerships, or corporations.

MINOR JOBS

It will be noted that the above law does not require performance and payment bonds where the contract price does not exceed \$25,000.00.

EXTENT TO PROTECTION

The protection of the payment bond extends not only to the immediate subcontractors for the contractor but to any person having direct contractual relationship with a subcontractor but no contractual relationship express or implied with the contractor relationship express or implied with the contractor furnishing the payment bond, provided notice is given to the contractor as required by Section 270b(a) of the Act as set forth above.

PRIVITY

The Act does not establish any privity between the United States and laborers, material men, subcontractors, etc., so as to authorize the officers of the Government to satisfy their claims from monies due to contractor; nor does the contract authorize the Government to withhold earned payments from the contractor because of his failure to pay subcontractors.

SUITS

When it becomes necessary to institute suit on a contractor's payment bond, such suit is brought in the name of the United States for the use of the person suing, in the United States District Court for the district in which the work is located. Suit may be instituted ninety days after the last of the labor was performed or material was furnished for which such claim is made, but no suit may be commenced after the expiration of one year after the work is completed or material is furnished. Such suit is an action at law.

Persons wishing to know whether any suit has been instituted upon the contractor's payment bond in a given case should inquire of the clerk of the United States District Court for the district in which the contract work is located.

CERTIFIED COPIES - AFFIDAVIT

Under the Miller Act the department secretary or agency head of the contracting agency is authorized and directed to furnish, to any person who makes application therefore, certified copies of the payment bond and the contract for which it was given, provided such person shall submit an affidavit that he has supplied labor or material for the contract work and payment therefore has not been made. Such applicants are required to pay for such certified copies such fees as fixed to cover the cost of preparation thereof. No particular form of affidavit for use in such cases has been prescribed.

LEGAL ADVICE

The Government cannot undertake to adjust differences or determine controversies between contractors or sub-contractors and persons furnishing material or labor, nor will it give advice as to the best method of securing or collecting claims. Claimants must consult their attorneys for answers to questions involving the determination of legal points or procedures.

Exhibit 8*12. The Miller Act Information Sheet (Cont'd).